Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 103.

MINNESOTA COMMERCIAL MEN'S ASSOCIATION,
Petitioner,

vs.

MINNIE MAE BENN, AS EXECUTRIX OF THE ESTATE OF ROBERT J. BENN, DECEASED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Petitioner's Brief.

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STATEMENT OF THE CASE.

This case comes before the court pursuant to a writ of certiorari to the Supreme Court of the State of Minnesota to review a decision rendered by that court affirming a judgment entered by the District Court of Hennepin County, Minnesota, in favor of the plaintiff (the respondent) in an action on a default judgment entered against the petitioner and in favor of the respondent in the State of Montana.

THE RESPONDENT is the executrix of the estate of one Robert J. Benn, deceased, who was a member of the defendant Association. It is conceded that the respondent

was duly appointed and duly qualified to sue in Minnesota in her capacity as executrix.

THE DEFENDANT (the petitioner) is a corporation duly organized and existing under the Laws of the State of Minnesota for the object and purpose of giving to its members conservative and reasonable health, accident and specific benefit insurance on a mutual plan at the least possible cost (By-laws, Article 1, Defendant's Exhibit "4," Record, page 82). It operates and conducts its business under and pursuant to Section 3536, General Statutes of Minnesota 1913, as amended by the Laws of Minnesota 1917, Chapter 183. The amendment referred to was not passed until after the transactions involved in this case and the original Section 3536 is set out in full hereinafter at page 19.

THE ORIGINAL ACTION in Montana, which culminated in the judgment sued on in Minnesota, was commenced by the respondent in March, 1916, against the petitioner in the District Court for the Eleventh Judicial District of the State of Montana, in and for the County of Flathead in said state, to recover insurance alleged to be payable to the respondent by virtue of the membership of her deceased husband in the Minnesota Commercial Men's Association.

THE MONTANA COURT in which the action was commenced was and is a court of general common law and equity jurisdiction, duly constituted, established and acting under and by virtue of the Laws of the State of Montana. *The summons and complaint* in the original action were served on the Secretary of State and the Insurance Commissioner of Montana on March 11th and 13th, 1916, respectively, pursuant to an order of the Clerk of the Court in which the action was commenced. *The*

Montana Statutes which it is claimed authorized service in this manner are alleged in the amended complaint and are set out verbatim hereinafter at page 16. The petitioner never received a copy of the summons or complaint from either the Insurance Commissioner or the Secretary of State of Montana. It received *no notice* of the commencement of the action in Montana in any form from the Insurance Commissioner and all the information received by the petitioner from the Secretary of State of Montana is contained in Plaintiff's Exhibits "C" and "D" (Record, pages 77-78). This information is most meager. The first letter (Exhibit "C") contained no information whatever,—not even the name of the plaintiff in the action. The second letter which was received in reply to inquiries by the petitioner contained no information regarding the nature of the cause of action, the amount of damages claimed or the name of the attorney for the plaintiff in the action and did not reach the petitioner until ten days after the purported service of the summons (Record, page 19).

THE PETITIONER APPEARED SPECIALLY by its attorney in the original action in Montana and solely for the purpose of objecting to the jurisdiction of the Montana Court and to that end filed a motion, based on affidavit, that the summons and the service thereof be vacated on the ground that the defendant (the petitioner) was a Minnesota corporation licensed to do business only in Minnesota and carrying on its business exclusively at its home and only office in Minneapolis, Minnesota; that it made no contracts in Montana; that it owned no property in Montana; that it never had any agents in Montana or elsewhere and that it had never done business in Montana; that the service of summons was void and that the Montana Court had no juris-

diction to hear, try or determine the cause of action sued upon (Record, pages 14-20). This *motion to quash* the service of summons was denied by order of the Montana Court on April 27th, 1916. Thereafter the petitioner neither appeared nor answered in the Montana action and on October 24th, 1917, judgment by default was entered against the petitioner for $6,545.90, with interest thereon at the rate of 8% per annum until paid (Record, page 23), that being the rate provided by the Revised Codes of Montana 1907, Section 5214, which is set out verbatim hereinafter at page 19. No part of this default judgment, which was entered by the Montana District Court, has ever been paid and, on October 23rd, 1918, the respondent commenced the present action in the District Court for the Fourth Judicial District of the State of Minnesota, in and for the County of Hennepin, to collect the Montana judgment. An *amended answer* was interposed by the petitioner in the Minnesota action which alleged that the petitioner was a Minnesota corporation and was not doing business in the State of Montana and had never agreed or consented to service of process on either the Insurance Commissioner or the Secretary of State of Montana; that the contract of insurance on which the Montana judgment was based was a Minnesota contract, made, executed and to be performed in Minnesota, and that the Montana judgment was rendered without jurisdiction and was void and that its enforcement would deprive the petitioner of its property without due process of law in contravention of both the Federal and State Constitutions.

THE CASE WAS TRIED in February, 1920, before the Honorable E. F. Waite, one of the judges of the District Court of Hennepin County, Minnesota, without a jury. *The trial court found* that the facts alleged in the amended

complaint were true excepting as regards certain dates which do not have any material bearing on the merits of the questions involved at this time and excepting also the allegation that the summons and complaint in the Montana action were sent to or received by the petitioner, which the court found was not a fact (Record, page 104). With these findings the petitioner has no cause to quarrel, except as hereinafter stated. Indeed, practically all of the facts alleged in the amended complaint regarding the Montana proceedings were admitted by the petitioner at the trial. It was further found as a fact, however, that at all times between November 6th, 1908, the date when the certificate of membership was issued to Robert J. Benn, and March 13th, 1916, the date when the summons and complaint in the Montana action were served on the Secretary of State of Montana, inclusive, the petitioner was transacting the business of health and accident insurance in the State of Montana (Record, page 104). It is to this finding that the petitioner objects. The evidence bearing on this question which was introduced at the trial is hereinafter reviewed in detail and it is the petitioner's contention that there is no evidence to support the finding that the petitioner was doing business in Montana; that the evidence is conclusive of the fact that the petitioner was not doing business in Montana; that the Montana Court in which the judgment sued on was entered had no jurisdiction of the person of the petitioner; that the Montana judgment is therefore null and void and is not entitled to be given full faith and credit; and that to enforce the Montana judgment will deprive the petitioner of its property without due process of law in violation of the United States Constitution.

The trial court further found as a conclusion of law

that the respondent was entitled to judgment against the petitioner. The petitioner takes exception to this finding on the ground that it was not found as a fact that the cause of action arose in Montana and it conclusively appears that it did not; that under such circumstances the Montana Court could not acquire jurisdiction of this cause of action by substituted service of process even if the petitioner were doing business in Montana. This constitutes the second question in the case.

Pursuant to the findings of the trial court judgment was entered against the petitioner in the District Court of Hennepin County, Minnesota, on July 1st, 1920, for $7,957.50 (that being the amount of the Montana judgment, with interest at the rate of 8% per annum from October 24th, 1917, plus $15.16 costs and disbursements).

Attached to the findings of the trial court and its order for judgment was a memorandum stating that the case was controlled by the decision of the Minnesota Supreme Court in *Wold v. Minnesota Commercial Men's Association*, 136 Minn. 380, 162 N. W. 461 (Record, page 105). An appeal was taken from this judgment to the Supreme Court of Minnesota where, in an opinion filed on May 27th, 1921, and reported in 149 Minn. 497 and 182 N. W. 999, the judgment of the trial court was affirmed. The decision of the Minnesota Supreme Court was a *per curiam* decision in which it is stated that

> "Our conclusion is that the Wold case should be followed until the Federal Supreme Court shall pronounce it erroneous" (Record, page 110).

The petitioner immediately filed a petition in this court for a writ of certiorari to review the decision of the Minnesota Supreme Court. The writ was allowed on October 28th, 1921, and the return filed on December 2nd, 1921.

From the above statement it can be readily seen that *the first question* involved is whether or not the trial court erred in finding that the petitioner was doing business in Montana. *The second question* is whether or not the Montana Court had jurisdiction of a cause of action which arose in Minnesota, even if the petitioner was doing business in Montana, where the only service was on the Secretary of State of Montana. *The petitioner also contends* that it was error for the trial court to allow interest on the Montana judgment at the Montana rate rather than at the Minnesota rate. The respondent has injected *a further question* into the case by claiming that, whatever the proper solution of the questions already suggested, the petitioner has estopped itself to question the jurisdiction of the Montana Court by its objection to the jurisdiction of the Montana Court.

Practically all the evidence introduced at the trial was directed to the question of whether the petitioner was doing business in Montana and may be briefly summarized as follows:

A LICENSE or certificate of authority to transact the business of accident and health insurance in the State of Minnesota is issued to the petitioner each year by the Commissioner of Insurance of the State of Minnesota. The license certificate for the year commencing March 1st, 1915, the year in which the original action was commenced in Montana, was introduced in evidence as Defendant's Exhibit "1" (Record, page 81) and a similar license has been issued each year since 1908 (Record, pages 36-37). The petitioner is not and never has been licensed or authorized to do business in any other state or country (Record, page 39).

THE ONLY OFFICE which is or has ever been main-

tained by the petitioner is in Minneapolis, Minnesota, and all its business is transacted at and from this office. *No property* of any kind or character is or has ever been owned by the Association in the State of Montana or in any other state excepting Minnesota (Record, page 43).

MEMBERSHIP in the Association is by its By-laws confined to male white persons engaged in commercial or professional pursuits of a non-hazardous nature and is designed primarily for traveling salesmen, solicitors, buyers and others engaged in similar pursuits (Section 1, Article II of By-laws, Record, page 82). The By-laws provide for the forfeiture of membership in case the member enters an employment which is more hazardous than that named in his application for membership (Record, pages 83, 84). As is intimated in some of the testimony, the fact that Benn's death took place while he was engaged in the occupation of tending bar was one of the principal grounds on which the claim of his widow was not paid by the Association (Record, pages 61, 62). The merits of the case are not, however, before the Court at this time and it is unnecessary to discuss them.

APPLICATIONS FOR MEMBERSHIP in the Association are made on blank forms prescribed and furnished by the petitioner and it is expressly provided by the By-laws, which constitute the contract between the parties, that no person can become a member of the Association until his application has been submitted to, passed upon and accepted by the Board of Directors *at the home and only office* of the Association in Minneapolis, Minnesota, and until a certificate of membership has been issued to him *at that office* (Section 2, Article II, By-laws, Record, page 83). *This is the only method* that is or has ever been used by the Association in accepting new members and

issuing certificates (Record, pages 38, 39). The Association is not concerned with the manner in which applications are received by it. They may either be mailed to it by or on behalf of the applicant or delivered personally to it at its Minneapolis office. As a matter of fact about one-third of the applications are received from the applicant personally at the Minneapolis office and the balance are received by mail (Record, page 49). In whatever manner they reach the Association, all applications are submitted to the Board of Directors *at the Minneapolis office* and, if approved, a certificate of membership is issued and mailed to the applicant at any address indicated by him at the time of the application, which may or may not be his residence. The Association is not concerned with and makes no inquiries regarding the legal residence or domicil of its members. It is interested only in having an address where each member can be reached or from which mail will be forwarded to him (Record, page 55). The certificate itself recites that it is executed by the Association *at its home office* in Minneapolis, Minnesota, and this is without exception the fact (Record, page 11). The contract of insurance therefore is a Minnesota contract and the petitioner enters into *no contracts in any other states.*

Assessments and Dues are all payable *at the Minneapolis office* of the Association in Minneapolis exchange and drafts on members are never drawn by the Association for this or any other purpose (Record, page 43). Assessments are made from time to time by the Board of Directors according to the needs of the Association and notice thereof is mailed *at Minneapolis* to the member at his last known address. Annual dues of $1.00 are collected in the same manner and the By-laws specifically provide that due notice shall be deemed to have been given

when such notice shall have been addressed to the last known address of a member and mailed *at the post office in Minneapolis, Minnesota* (By-laws, Article 2, Sections 8 and 9, Record, pages 84-85).

NEW MEMBERS are procured solely through advertising. Every form of advertising which is deemed productive is employed. Lists of eligible prospects are procured from every source available and these prospects are then appealed to directly through circular letters and other advertising matter forwarded by mail *from the Minneapolis office*. The appeal is based largely on the small cost of this insurance (Record, page 40). The explanation of this low cost as compared to the cost of insurance in any of the old line companies or the larger mutual companies is that *the Association employs no agents* and thereby reduces its operating expenses by at least one-third. This explanation is made and emphasized in practically all the advertising matter used in the attempt to procure new members (Record, page 41). A typical example of these advertising circulars was introduced in evidence as Defendant's Exhibit "5" (Record, page 102).

ADVERTISING THROUGH ITS MEMBERS is resorted to by the Association for the purpose of procuring new members and all members are expected to use their influence to further the interests of the Association (By-laws, Article II, Section 7, Record, page 84). They are urged to and often do send in lists of prospects (Record, page 40). Whenever assessment notices or other communications are sent out to members, blank forms for application are usually enclosed and the member is asked to try to induce his friends or associates to apply for membership. No member, however, is or has ever been given any authority whatever to act for or on behalf of the

Association in any manner. A member cannot accept an application or receive on behalf of the Association the initial premium or any assessment or dues. In short, the members are simply used as an advertising medium for the Association for the purpose of placing its plan before the public. The application blanks provide a space for the recommendation of the applicant by a member. This, however, is not in any way essential to the acceptance of the application. Nor is the recommendation of a member relied upon to any extent whatever in determining the acceptability of the application. The sole purpose of providing for such recommendation is to determine the returns from the various methods of advertising, of which this is one (Record, page 40).

MEMBERS RECEIVE NO COMPENSATION for inducing others to apply for membership. It is to the obvious advantage of every member to increase the membership because the cost of the insurance is directly dependent on the number of members. This fact is constantly placed before the members by circular letters and other advertising matter and is used as the inducement which prompts members to exert themselves in procuring applications.

PREMIUMS OR PRIZES have occasionally been offered to members who induce a certain number of non-members to apply for membership. These premiums or prizes have invariably been in the form of *further advertising matter* such as lapel or identification buttons, never break pencils, memorandum books, grips or grip tags, watches, billfolds, etc., all bearing the insignia or trade-mark of the Association. All these articles are purposely in the nature of traveling men's accessories and of such a character that they will be likely to come under the observation

of traveling companions of the owner. They invariably have the Association's name in a conspicuous place and are quite obviously designed as an advertising medium (Record, pages 41, 47, 54, 58, 103). A typical example of the circular letters in which premiums or prizes of this nature have been offered to the members was introduced in evidence as Plaintiff's Exhibit "A" attached to the depositions (Record, page 80). It is apparent from the most casual reading of this letter that nothing in the nature of an employment or agency is intended or could be understood. *No authority to do any act* on behalf of the Association is suggested. To be sure, members may, if they choose, as a favor to an applicant, mail his application and initial premium to the Association. If they do so, it is as agent of the applicant and not of the Association and it is treated by the Association as the applicant's act. If the application is rejected, the premium is returned directly to the applicant. The acceptance by a member of the initial premium could not bind the Association (Record, pages 49, 57, 58). The members cannot therefore be regarded in any sense as the agents or representatives of the Association.

No Agents or Solicitors are employed by the Association even in Minnesota (Record, pages 39, 68). *The Minnesota Statute* under which the Association is licensed and operates forbids the payment of commissions or other compensation for securing new members and yet for thirteen years the Insurance Commissioner of Minnesota has annually issued to this Association a certificate of authority to carry on its business in the manner herein described. It appears that from time to time the Association receives inquiries asking for the privilege of representing the Association in the capacity of agent or solicitor (Record,

page 42). Defendant's Exhibit "7," a form letter used in answering all such inquiries, was excluded from evidence (Record, pages 42, 43), but the testimony is undisputed that all of such requests are refused.

PAYMENT OF LOSSES by the Association is governed by the same policy as the original issue of the certificate of membership and the collection of assessments and dues. *No act is done by or on behalf of the Association excepting at its home office in the State of Minnesota.* All losses are paid by check on a Minneapolis bank mailed from the Minneapolis office to the member or his beneficiary. All such checks are payable at Minneapolis in Minneapolis exchange. Drafts on the Association to cover losses are frequently presented but never honored (Record, pages 43-44).

PROOF OF LOSS must be made by the member or his beneficiary on forms provided by the Association on request and must be filed with the Association at Minneapolis together with a report by the attending physician (By-laws, Article X, Section 1, Record, pages 97, 98). In case the attending physician does not furnish the requested report or if his report is inadequate or improper the Association procures what information is necessary to determine the validity of the claim through a report from some local physician selected at random from a list of reputable physicians in the particular locality involved (Record, pages 49, 50). *No resident physicians* are employed by the Association except in Minnesota (Record, page 43). *Further investigation*, including medical and post mortem examinations, may be made by or on behalf of the Association under Article X, Section 3 of the By-laws (Record, page 98). There is not, however, any evidence in the Record to show that advantage has ever been

taken of this right either in Montana or any other state.

ADJUSTMENT OF LOSSES is within the sole and exclusive power of the Board of Directors of the Association *in Minneapolis*. In no event is any one else authorized to adjust any losses. Proofs of claims received at Minneapolis are submitted to the Board of Directors which includes one medical director and the reports and statements which the claimant or his beneficiary and the attending physician or some other local physician are required to file are so constructed as to enable the Board of Directors to determine from them whether or not the claim should be allowed (Record, page 43).

ROBERT J. BENN'S APPLICATION for membership in the Association was executed by him on November 2nd, 1908, and is in evidence as Defendant's Exhibit "2" (Record, page 81). It was an application for health insurance only. It was received by the petitioner and accepted by the Board of Directors on November 6th, 1908, and a certificate of membership (Exhibit "A" attached to the complaint in the Montana action, Record, page 11) was issued at Minneapolis the same day and mailed to Benn, addressed to Kalispel, Montana (Record, pages 38, 39). On April 29th, 1911, Benn applied for additional protection, namely, accident insurance, and this application was accepted at Minneapolis on May 3rd, 1911 (Defendant's Exhibit "3," Record, page 81). Assessments and dues were paid by Benn regularly as appears from Plaintiff's Exhibit "E" (Record, page 78) until March 5th, 1915, the date of his death. It does not appear that there was anything unusual or irregular in the proof of claim which was filed or the attending physician's report and there was therefore no report obtained from any other physician. The respondent made a vain attempt to prove that the

Association caused an investigation to be made of the circumstances surrounding Benn's death. The testimony introduced for this purpose in the deposition of A. J. Johnson was wholly incompetent and was therefore stricken out (Record, pages 65, 66). On the other hand, the testimony of Mr. Clement on cross examination stands uncontradicted to the effect that there was no such investigation made by or on behalf of the Association and that all the information which the Association had was in its files and had come to it through the mails without any solicitation on its part, and that the Association had specifically refused to use the adjuster or investigator who was being sent out by another insurance company (Record, pages 52 to 54).

In Brief, it appears affirmatively and beyond all question that the manner in which the petitioner conducted and still conducts its business entails *no act* by or on behalf of it in the State of Montana; that it owns *no property* in that state; that *none of its contracts* are made in that state; that it employs *no agents* in that state, either solicitors, resident physicians, investigators or adjusters, and the Record is wholly devoid of any evidence that the petitioner has ever participated in even so much as a single isolated transaction in Montana. The only conceivable basis on which the Minnesota Courts can have relied in holding that the petitioner was doing business in Montana is the single fact that some of the petitioner's members may temporarily or even permanently reside in Montana and under the decisions of this Court that is not sufficient to constitute the doing of business so as to justify substituted service of process.

MONTANA STATUTES.

Revised Codes Montana 1907, Section 4017.

License Fee—Amount. All insurance corporations, associations and societies, as hereinbefore specified in the preceding section, before commencing to do business in the State of Montana, shall be required to secure a license authorizing them to transact business of insurance corporations, associations or societies, and shall pay to the State Auditor, for such license, the following fees:

For a license to collect in any one year premiums amounting to Five Thousand Dollars or less, One Hundred and Twenty-five Dollars.

For a license to collect in any one year premiums over the sum of Five Thousand Dollars, the sum of Twenty Dollars for each and every One Thousand Dollars to be so collected; provided, that, where any insurance corporation, association or society has fifty per cent of its capital stock invested in Montana securities, such insurance corporation, association or society shall be allowed to deduct whatever tax it may have already paid, from the amount due for such license fee or tax, as herein provided (Section 3 of Chapter 49, Laws of 1915).

Revised Codes of Montana 1907, Section 4062.

Amount of Paid-up Capital—Appointment of Attorney in Fact—Process—Service. It shall not be lawful for any insurance company, association or partnership, organized or associated for any of the purposes specified in this chapter, incorporated by, or organized under the laws of any other state, or the United States, or any foreign government, directly or indirectly, to take risks or transact any business of insurance in this state, unless possessed of two hundred thousand dollars of actual paid-up capital, exclusive of any assets of such company as shall be deposited in any other states or territories, or foreign countries, for the special benefit or security of the in-

sured therein; any such company desiring to transact any such business as aforesaid, by any agent or agents in this state, shall appoint one attorney in fact in each county in which agencies are established, resident of such county, and shall file with the State Auditor a written instrument duly signed and sealed, authorizing such attorney in fact of such company to acknowledge service of process, for and in behalf of such company in the state consenting that such service of process, mesne or final, upon such attorney shall be taken and held as valid as if served upon the company to the laws of this state, or any other territory or state, and waiving all claim of right or error by reason of such acknowledgment or service and also that in case of death, absence, or if for any other cause, service of process cannot be made upon the attorney so appointed, service of process may be made on the State Auditor and Insurance Commissioner *ex officio* of this state, or his successors in office, with the same power and effect as that served upon such agent; and such power of attorney cannot be revoked or modified (except that a new one may be submitted) so long as any policy or liability remains outstanding against said company in this state. Whenever such lawful process against any insurance company shall be served upon the Commissioner he shall forthwith forward a copy of the process served on him by mail, postpaid, and directed to the secretary of the company, or in case of companies of foreign countries, to the resident manager in this country; and shall also forward a copy thereof to the general agent of said company in this state.

Said company shall also file a certified copy of their charter or deed of settlement, together with a statement under the oath of the president or vice-president, or other chief officer, and the secretary of the company for which they may act, stating the name of the company and the place where located, the amount of its capital with a detailed statement of the facts and items, as required from companies organized under the laws of this state, as per Section 3920 (4058) hereof; such statement shall also show to the full satisfaction of the State Auditor and Insurance Commissioner *ex officio* that said company,

if organized without the United States of America, has deposited in some one of the United States or territories, a sum not less than one hundred thousand dollars for the special benefit or security of the assured therein, and shall file also a copy of the last annual report made under any law of the state, territory or foreign country by which said company was incorporated; and no agent shall be allowed to transact business for any company whose capital is impaired by the liabilities, as stated in Section 3920 (4058) of this chapter, to the extent of twenty per cent thereof while such deficiency shall continue; provided, that any company formed for the purpose of carrying on the business of plate glass, health, accident, livestock, steam boiler, hail and cyclone, credit or other liability insurance, both foreign and domestic, shall have not less than one hundred thousand ($100,000) dollars of capital stock subscribed, fifty per cent of which shall be paid up in cash, and invested as provided by the laws governing the investment of capital stock of fire insurance companies. (Approved February 28th, 1913.)

REVISED CODES OF MONTANA 1907, SECTION 6519.

Service on Corporations. Any corporation organized under the laws of the State of Montana, or doing business therein, may be served with summons by delivering a copy of the same to the president, secretary, treasurer, or other officer of the corporation, or to the agent designated by such corporation as the person upon whom service shall be made as required by law, and if none of the persons above mentioned can be found in the county, then service may be made upon any clerk, superintendent, general agent, cashier, principal director, ticket agent, station-keeper, managing agent or other agent, having the management, direction, or control of any property of such corporations. If none of the persons in this section described can be found in the county in which such action is commenced, then service may be made, as provided in this section, upon any of the persons herein described in any county of this state. And if

none of the persons above named can be found in the State of Montana, and an affidavit stating that fact shall be filed in the office of the clerk of the court in which such action is pending, then the clerk of the court shall make an order authorizing the service of summons to be made upon the Secretary of State, who shall be and is hereby constituted an agent and attorney in fact to accept service on behalf of such corporation, and service upon said Secretary of State shall be deemed personal service upon said corporation. (Amendment approved February 18, 1915; Laws 1915, p. 31.)

REVISED CODES OF MONTANA 1907, SECTION 5214.

Interest—Judgment. Interest is payable on judgments recovered in the courts of this state, at the rate of eight per cent (8%) per annum, and no greater rate, but such interest must not be compounded in any manner or form. (Act approved February 28, 1899.) (6th Sess. 125.)

MINNESOTA STATUTES.

GENERAL STATUTES OF MINNESOTA 1913, SECTION 3536.

Policies of Associations Confining Membership to Commercial Travelers, etc. Any domestic assessment, health and accident insurance association now licensed to do business in this state which confines its membership to commercial travelers and which does not pay commissions or other compensation for securing new members shall be exempt from the provisions of law relating to the form and contents of policies of health and accident insurance when approved by the Commissioner of Insurance. ('13, C. 410, Section 1.)

GENERAL STATUTES OF MINNESOTA 1913, SECTION 5805.

Rate. The interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for a year, unless a different rate is contracted

for in writing; and no person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than ten dollars on one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement interest shall not be compounded, but any contract to pay interest, not usurious, upon interest overdue, shall not be construed to be usury. Contracts shall bear the same rate of interest after they become due as before, and any provision in any contract, note or instrument providing for an increase of the rate of interest after maturity, or any increase therein after making and delivery, shall work a forfeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest before maturity (2733).

SPECIFICATIONS OF ERROR.

I.

The evidence does not support the trial court's finding of fact that on the 6th day of November, 1908, and at all times thereafter, until and including the 13th day of March, 1916, defendant was engaged in the business of health and accident insurance on a mutual plan and *transacted such business in the State of Montana.*

II.

The trial court's finding as a conclusion of law that the plaintiff was entitled to recover of the defendant herein is not supported by the evidence or the findings of fact in that there is no evidence or finding that the cause of action on which the Montana judgment was based arose in Montana and *the evidence is conclusive that said cause of action did not arise in Montana.*

III.

The evidence does not support the trial court's finding as a fact that the Montana judgment was duly made and entered upon the merits as alleged in paragraph 6 of the amended complaint in that the evidence is conclusive that said judgment was made and entered by default without jurisdiction over the defendant or the cause of action and is wholly void and deprives defendant of its property without due process of law in violation of the United States Constitution.

IV.

The trial court's finding as a conclusion of law that the plaintiff was entitled to recover of the defendant interest on $6,545.90 at the rate of 8% per annum from the 24th day of October, 1917, until the entry of judgment herein, is contrary to Section 5805, General Statutes of Minnesota 1913.

BRIEF OF THE ARGUMENT.

The petitioner's position may be briefly outlined as follows:

1. *The petitioner is not and never has been transacting business within the State of Montana so as to enable the courts of that state to acquire personal jurisdiction over it by substituted service of process on a state official. The default judgment based on such service is therefore void as a violation of the due process clause of the Federal Constitution and should not have been given full faith and credit by the Courts of Minnesota.*

The mere writing or carrying of insurance on the lives or health of persons who may reside in Montana, coupled

with the receipt of premiums from such persons are acts over which the State of Montana cannot constitutionally exercise any control and do not constitute the doing of business which is essential to the implication of a consent by the petitioner to substituted service of process on state officials.

The petitioner has never been licensed to do business in Montana, has never expressly consented to substituted service on state officials, has never owned property there, has never made contracts there, has never performed contracts there, has never had any office there, has never had any agents there, and has never done any act in Montana which constitutes "doing business" there.

2. *Irrespective of whether or not the petitioner is or was doing business in Montana, the cause of action on which the Montana judgment is based arose in Minnesota and not in Montana and the Courts of Montana cannot acquire jurisdiction over such a cause of action by substituted service of process on state officials to which the petitioner has never actually consented.*

3. The petitioner is not estopped to question the jurisdiction of the Montana Court by reason of having objected to this jurisdiction in the original action in Montana.

4. Even if the Montana judgment were entitled to full faith and credit in the Courts of Minnesota, the respondent would only be entitled to interest from the date of the Montana judgment at the rate of six per cent in accordance with Minnesota Law and not at the rate of eight per cent as provided by Montana Law.

I.

The petitioner is not and was not in 1908 or 1916 or at any other time "doing business" in the State of Montana.

The summons and complaint in the original action in Montana were served on the Insurance Commissioner and on the Secretary of State of Montana. The respondent attempts to justify this service under the Revised Codes of Montana for 1915, Section 4062, as amended by Laws 1913, page 54, and Section 6519 as amended by Laws 1915, page 31.

It will be noted at the outset that the first section above mentioned which provides for service on the Insurance Commissioner requires any foreign insurance company, before taking risks or transacting any business of insurance in Montana, to file with the State Auditor a written instrument consenting that service of process may be made on the State Auditor and Insurance Commissioner *ex officio* of Montana. *There is no provision in this section or in any of the Statutes of Montana for service on the Insurance Commissioner in case this written authority is not filed.* It is conceded in the present case that no such written authority was ever filed. It is obvious, therefore, that the service of process on the Insurance Commissioner was wholly without any authority whatsoever in the Statutes of Montana and was wholly without any effect unless the petitioner was doing business in Montana and therefore estopped to deny compliance with the Statutes.

The service on the Secretary of State was apparently attempted under the other section of the Montana Statutes referred to which provides that any corporation *doing business in the State of Montana* may be served with sum-

mons, if all the other methods provided fail, by serving the Secretary of State. We do not pretend to question the constitutionality of this section; but it is only constitutional because it requires as a condition precedent to such service that the corporation be doing business in Montana.

The fundamental limitation on the jurisdiction of the courts of a state is the general principle of international law that a state cannot reach out and exercise control over persons or property not within its border. The application of this principle to cases involving individuals is a comparatively simple matter. They must be personally served within the state. A corporation on the other hand, being nonexistent physically, cannot be personally served excepting by service on its actual agents. In other words, such service is personal service on a corporation. This must necessarily be so and was recognized at an early date by this Court.

> "The doctrine of that case (*Pennoyer v. Neff*, 95 U. S. 714) applies, in all its force, to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation being an artificial being can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the state where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the Statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the state is passed difficulties

arise; it is not so easy to determine who represent the corporation there, and under what circumstances service on them will bind it.

* * * * * * * * *

"All that there is in the legal residence of a corporation in the state of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the state. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions.

"The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other states, for matters within the sphere of their agency, is, in effect, serving process on it as much so as if such agents resided in the state where it was created" (*St. Claire v. Cox*, 106 U. S. 350.)

So it has been repeatedly held that no Statute is necessary to justify service of process on a corporation by serving one who is actually the corporation's agent. Such service, being personal service on the corporation, is valid irrespective of Statute.

In re Hohorst, 150 U. S. 653.

Barrow Steamship Company v. Kane, 170 U. S. 100.

Newby v. VanOffen, L. R. 7 Q. B. 293.

In the present case there was no service on anyone actually authorized by the petitioner to accept service. In other words there was no service on any agent of the

Association. If the service on the state officials of Montana is binding on the petitioner, it can only be because from the facts of the case the consent of the petitioner to such service can be implied. Such an implication arises only if the petitioner has engaged in transactions which the State of Montana had the right to prohibit. In order to imply such a consent, it must be shown that the petitioner did something which the State of Montana had a right to prevent it from doing and therefore the right to impose conditions on its doing. The cases which perhaps illustrate more clearly than any others that this is the only basis on which substituted service on a state official can be supported in the absence of express consent are those cases which hold that a State Statute authorizing substituted service on a non-resident individual who is doing business within the state is unconstitutional because the state has no right to prevent or prohibit a non-resident individual from doing business within its borders and no right to impose conditions on his so doing and therefore no consent to such service can be implied from his so doing.

Flexner v. Farson, 248 U. S. 289.

Cabanne v. Graf, 87 Minn. 510, 92 N. W. 461.

Mordock v. Kirby, 118 Fed. 180 (C. C. W. D. Ky.).

Brooks v. Dunn, 51 Fed. 138 (C. C. W. D. Tenn.).

Caldwell v. Armour, 43 Atl. 517, 1 Pennewill 45 (Del.).

Oddly enough even the Minnesota court in *Cabanne v. Graf*, *supra*, has recognized that this implication of consent to service other than personal service from the fact that the defendant has committed some act which the state has the right to prohibit is the only basis of jurisdiction

over non-resident corporations.

> "Such non-resident person, unlike a corporation, carries on business in this state not by virtue of its consent, but by virtue of the Federal Constitution which guarantees to the citizens of each state all privileges and immunities of citizens of the several states; hence it cannot be implied from the fact that he does business within the state that he consents to submit himself to the jurisdiction of its courts in personal actions upon service of process on his agent. He submits his property which he sends into the state to the jurisdiction of its courts, but not his person" (*Cabanne v. Graf*, 87 Minn. 514).

We call attention to this fundamental conception principally for the purpose of demonstrating the fallacy of the contention that counsel for the respondent advanced on the argument below, to-wit: That as the petitioner's "method of writing insurance was identical everywhere, defendant's contention that it wrote no business in Montana is tantamount to contending that it wrote no business anywhere." It is not the doing of every act which is in any manner connected with the State of Montana that constitutes "doing business" as that term has been construed by the courts for the purpose of determining jurisdictional questions.

It is established by the decisions of this court that in an action against a domestic corporation on a foreign judgment which was based on substituted service of process the ultimate question of whether or not the foreign court rendering the judgment had jurisdiction and the preliminary questions of whether or not the defendant was doing business in the foreign jurisdiction and whether or not the cause of action arose therein are all of them questions arising under the Constitution of the United States, and

the decisions of this Court constitute the only final and controlling authority.

Thompson v. Whitman, 9 Wall. 459.

Scott v. McNeal, 154 U. S. 34.

Conn. Mutual Life Insurance Company v. Spratley, 172 U. S. 602.

Old Wayne Life Association v. McDonough, 204 U. S. 8.

Provident Savings Society v. Kentucky, 239 U. S. 103.

The decisions of this Court clearly establish the principles by which this case must be governed and the decision of the Minnesota Supreme Court disregards these principles and these decisions. Both the trial court and the Minnesota Supreme Court were embarrassed and perhaps prevented from giving this case their unbiased consideration by the previous decision of the Minnesota Supreme Court in *Wold v. Minnesota Commercial Men's Association*, 136 Minn. 38, 162 N. W. 461. The trial court felt that it was absolutely controlled by this decision (Record, page 105). The Supreme Court, inferentially at least, recognized the doubt which the full and complete arguments in the present case had thrown on the previous decision when they stated in their opinion that

> "Our conclusion is that the Wold case should be followed until the Federal Supreme Court shall pronounce it erroneous."

This Court is of course not bound by or subject to the influence of the Wold case. This previous Minnesota decision will be analyzed later and it will appear that it was not only unjustified on principle but also without support in the cases relied on and cited to support it. We will first, however, review the previous decisions of this

Court which are controlling in the present case.

There are only a few aspects of the business as carried on by the petitioner which are or can be seriously urged as constituting the doing of business in Montana. The record is clear, and indeed the respondent has never denied, that the petitioner has never owned any property in Montana; that it has never been licensed to do business there; that it maintains no office there; that it has never made any contracts there; that it has never done any acts there pursuant to or in performance of its contracts; that it has never made any contracts to be performed there (unless the right to investigate losses and the fact that no specific place is provided for the payment of losses gives to its contracts this characteristic); and that it has never had any agents there (unless every member is an agent).

The holding of the Minnesota Courts that the petitioner was doing business in Montana must therefore be predicated on a holding that one or more of the following facts constitute doing business:

1. Carrying insurance on the lives or health of persons who reside in Montana coupled with the receipt of assessments and dues in Minnesota from such persons.

2. The unexercised right of the petitioner to investigate losses in Montana.

3. The fact that because no place is specified for the payment of losses they are payable at the residence of the insured although no payments have ever been actually made in Montana.

4. The activity of members of the Association while in Montana in inducing others to apply for membership.

For convenience sake we will consider separately each of the four characteristics of the petitioner's course of

business which is urged as a justification of the decision of the Minnesota Court.

(1) *The mere carrying or writing of insurance on the lives or health of residents of Montana coupled with the receipt at Minneapolis of assessments* and dues does not constitute doing business in Montana and cannot be prohibited, prevented or regulated by the State of Montana.

The receipt at Minneapolis of applications for membership from residents of Montana by mail, the acceptance thereof by the Board of Directors and the issuance of certificates thereon at Minneapolis and the forwarding of them by mail to the applicant, the mailing of notices of assessment to members and the receipt at Minneapolis of assessments and dues, the receipt of proofs of claim, the submission of these to the Board of Directors at Minneapolis and the mailing of checks payable at Minneapolis in payment thereof—in short the usual course of business of the petitioner requires no act to be performed outside the office of the Association in Minneapolis and could not on any conceivable theory constitute the doing of business in Montana. The only way in which this business is connected in any manner with the State of Montana is that the person insured may be a resident of that state. *It can no longer be contended that entering into a contract of insurance in one state with a resident of another state constitutes doing business therein.*

Allgeyer v. Louisiana, 165 U. S. 578.

The case cited involved the constitutionality of a Statute of Louisiana subjecting to a fine any person who does any act within Louisiana to effect for himself insurance on property then within that state in any marine insurance company which has not complied with the Laws of Louisi-

ana. The defendant had taken out an open policy of marine insurance with a New York company, the contract having been made in New York. Pursuant to the terms of this contract he mailed in Louisiana to the insurer in New York a letter notifying them of the shipment in question which was at that time in Louisiana. Under the policy, the insurance on this shipment became effective at once. This Court held that as applied to such a case the Louisiana Statute was unconstitutional because a contract of insurance made in New York was not subject to the control or regulation of the State of Louisiana and the letter of notification did not constitute a new contract but was simply the means by which the original contract was made applicable to particular property. The mere fact that the property covered by the contract of insurance was within the State of Louisiana gave that state no control over the contract. In the course of the opinion Mr. Justice Peckham said:

> "The Atlantic Mutual Insurance Company of New York has done no business of insurance within the State of Louisiana and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens even if that property were in the State of Louisiana, and correlatively the citizens of Louisiana had the right without the state of entering into contract with an insurance company for the same purpose. Any act of the state legislature which should prevent the entering into such a contract, or the mailing within the State of Louisiana of such a notification as is mentioned in this case is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the state" (165 U. S. 592).

As the State of Montana cannot restrict or regulate the making of a contract of insurance in Minnesota between a Minnesota corporation and a resident of Montana, neither can it regulate or impose conditions on the continuation of policies on lives or property in Montana or the performance of such contracts of insurance where the insurance company does not perform any acts within the State of Montana.

In *Provident Savings Society v. Kentucky*, 239 U. S. 103, the State of Kentucky attempted to collect from a foreign insurance company the license tax imposed by its laws for the privilege of doing business within the state. The company had concededly done business in Kentucky prior to January 1st, 1907, but denied liability thereafter on the ground that it had then entirely ceased doing business and withdrawn all its agents and that all premiums received after that date on policies previously issued in Kentucky were received at its Home Office in New York. A demurrer to the answer setting up these facts as a defense was sustained and this ruling was affirmed by the Court of Appeals of Kentucky (*Provident Savings Society v. Commonwealth*, 160 Ky. 16). The theory on which the Kentucky Court proceeded is illustrated by the quotation from its opinion contained in the opinion of this Court:

> "'However, counsel for appellant insists that an insurance company is doing business in this state in the meaning of the statute so long as it is insuring the lives of residents of this state and furnishing protection to the beneficiaries named in the policies against loss from death of the insured, this being the chief business for which insurance companies are organized, and we are unable to see how the court' (referring to the court of first instance) 'held, that a company collecting premiums on policies issued in this state, when

> it was authorized to do business in this state, can be said "not to be doing business," when it was still insuring those same lives and collecting the premiums upon the policies'" (239 U. S. 111).

The exact question now before the Court was therefore presented by that case, to-wit, whether or not the mere fact that a foreign insurance company writes or carries policies covering lives or property in a state constitutes the doing of business within that state. Reversing the Kentucky court, this Court held that this did not amount to the doing of business in Kentucky. The principles which governed that case must control in the present case. In the course of his opinion Mr. Justice Hughes summed up the matter as follows:

> "Upon the averments which stand admitted in the record it must be assumed that *it was not performing any acts within the jurisdiction of Kentucky.* It had sought to withdraw itself completely from the state. The conclusion that it continued to do business within the state, notwithstanding this withdrawal, appears to be based solely upon the fact that it continued to be bound to policy holders resident in Kentucky under policies previously issued in that state and that it received the renewal premiums upon these policies. As the policies remained in force, it is said that the company continued to furnish protection to citizens of Kentucky. The renewal premiums, as already stated, were paid in New York. There is, however, a manifest difficulty in holding that the mere continuance of the obligation of the policies constituted the transaction of a local business for which a privilege tax could be exacted. As a privilege tax, the tax rests upon the assumption that what is done depends upon the state's consent. *But the continuance of the contracts of insurance already written by the company was not dependent on the consent of the state.* It is true that acts might be done within the state in connection with

such policies, as for example in maintaining an office or agents although new insurance was not written or solicited, which could be considered to amount to the continuance of a local business. *In such case it would be the actual transaction of business that would furnish the ground of the license exaction, and not the mere existence of the obligation under policies previously written.* These policies are contracts already made; the state cannot destroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. *Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the state's control. Allgeyer v. Louisiana*, 165 U. S. 578; *Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 241; *New York Life Insurance Co. v. Head*, 234 U. S. 149, 163" (239 U. S. 113, italics ours).

The application of this language to the facts of the case at bar is patent. A state can no more obtain jurisdiction over a foreign corporation by substituted service, unless such corporation does acts which are dependent on the consent of the state, than it can impose a license tax. The making of a contract in Minnesota is an act over which Montana cannot exercise control even though such contract be made with a citizen of Montana and concerns persons or property situated in Montana; the obligations of such contracts are just as sacred as those in the case cited. In order to justify the assumption of jurisdiction by the Montana Courts, therefore, there must have been some acts done by the petitioner within that state in connection with such contracts which amount to the transaction of business in Montana, and it is submitted that the record is wholly devoid of any evidence of such acts. In issuing, at its only office in Minneapolis, insurance policies or certificates of membership to persons resident temporarily or permanent-

ly in Montana, petitioner is doing nothing over which the State of Montana can exercise any control; petitioner's right to enter into contracts in Minnesota is in no way dependent on the consent of the State of Montana, and from this fact no consent to substituted service of process on the state officials of Montana can be implied.

Nor do the subsequent dealings between the Association and a member constitute doing business elsewhere than in Minnesota, where they consist solely of the use of the United States mail for the purpose of forwarding notices of assessments and dues, the receipt of funds covering same, the receipt of proofs of loss and the forwarding of checks in payment thereof, where no act is done by or on behalf of the petitioner excepting at its Minnesota office, where all payments, whether to or by the Association, are in Minneapolis exchange, where all investigation, adjustment and other exercise of discretion or judgment is the sole and exclusive right of the Board of Directors sitting in Minneapolis, and where no person is authorized or permitted to do any act which creates or discharges a legal liability excepting said Board of Directors.

Not only has this Court clearly expressed itself to the effect that where a foreign insurance company has done no act within a state which can constitutionally be prohibited or regulated by that state it is not doing business within that state, merely because it carries insurance on lives or property situated there and receives at its Home Office premiums and proofs of loss and settles and adjusts losses at its Home Office, but this has been the uniform expression of all the Federal Courts.

> "Certainly the issuing of a policy in New York on property here (Arkansas) cannot be considered as the carrying on of business in this state within the intent

and meaning of the Statute in question."

Marine Insurance Company v. St. Louis, I. M. & S. Railway Company, 41 Fed. 643, 653 (C. C. E. D. Arkansas).

"But the plaintiff here contends that 'the very act of insuring property situated in the State of Maine is of necessity doing business in that state,' and he necessarily concedes that the defendant company did not have 'an office or agent in the state.' There is no proof here that the company ever issued other fire policies covering property in that state, and the question simply is whether the insurance, by correspondence, of property in a state belonging to a resident therein by a foreign insurance company, is carrying on or doing business in such state. If A, a resident of Maine, should, while at Memphis, personally procure insurance on his property there, in a Memphis company, and immediately pay the premium, could it be insisted that the transaction was a Maine one? Or if the owner of a ship or cargo at sea, or in a foreign port, should himself, at Memphis, so effect insurance thereon in such company, would it be contended that the transaction was other than a contract made in Tennessee, or that the business was done elsewhere than in this state? Or, in the case first put, would the fact that the business was negotiated by correspondence make it any less business done here?"

Hazeltine v. Mississippi Valley Fire Insurance Company, 55 Fed. 743, 747 (C. C. W. D. Tenn.).

"But the mere existence of these two policies in the hands of persons resident in the state does not make out the doing of business within it by the company with whom they were negotiating and by whom they were written entirely outside of it. The business, such as it was, was done and completed when they were issued. Otherwise the mere change of residence into the state by persons holding policies obtained elsewhere would be enough to establish the charge and that will hardly be contended for."

Frawley, Bundy & Wilcox v. Pennsylvania Casualty Company, 124 Fed. 259, 264 (C. C. M. D. Pa.).

As indicated by the passage last quoted, any other result is practically inconceivable. The results of making the doing of business by an insurance company dependent on the location of the risk, be it property or person, are too obviously preposterous to permit the serious consideration of such a contention. Except in the single case of immovable property, the risk, whether it be property or person, may move from state to state with or without the knowledge of the insurer and the company may thus at any time discover that it is violating the law and is subject to heavy penalties unless it has procured licenses in all the states of the Union. Were it not for the fact that the Minnesota Supreme Court has held to the contrary both in this case and in the previous decision already referred to, we would not have deemed it necessary to present this question as fully as we have. An analysis of this previous decision and the cases relied upon in reaching it will illustrate and explain how the Minnesota Court was drawn into this obvious error.

The opinion in *Wold v. Minnesota Commercial Men's Association*, 136 Minn. 380, 162 N. W. 461, on this question is brief and sets forth the facts on which the court relied in holding that the defendant was doing business in Wisconsin. We therefore quote it verbatim.

> "Defendant is a purely mutual insurance company incorporated under the laws of the State of Minnesota, and has its office or place of business in the city of Minneapolis. It has no other office or place of business anywhere, and has no agents of any kind except the officials at its Minneapolis office. Plaintiff is, and for many years has been, a resident of Amherst in the State of Wisconsin. Defendant from its Minneapolis office mailed plaintiff at Amherst a blank application for membership accompanied by a circular soliciting members. Plaintiff filled out the application at Am-

herst and mailed it to defendant at Minneapolis. Defendant made out and executed the certificate of contract of insurance at Minneapolis and mailed it to plaintiff at Amherst. Thereafter defendant mailed notice of assessments as they became due to plaintiff at Amherst, and plaintiff transmitted the amount of such assessments by mail to defendant at Minneapolis. Defendant obtained other members residing in Wisconsin in the same manner and conducted its business with them in the same manner. Although defendant had no soliciting agents, it offered premiums to its members for procuring others to become members, and the notices of assessment sent to plaintiff and others were usually accompanied by blank applications for membership for use in procuring additional members. The insurance contract gives defendant the right to make such examination and investigation as it sees fit concerning claims arising under its contracts, including the right to make medical and post mortem examinations, and also requires that disputed claims be submitted to arbitration. That procuring members, collecting assessments, and conducting business in the manner stated, constitute doing business in the state of which the members so procured are residents, we think is no longer open to question. *Kulberg v. Fraternal Union of America*, 131 Minn. 131, 154 N. W. 748; *Braunstein v. Fraternal Union of America*, 133 Minn. 8, 157 N. W. 721; *Connecticut Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Commercial Mut. Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782; *State v. Columbian Nat. Life Ins. Co.*, 141 Wis. 557, 124 N. W. 502."

It is obvious that the cases cited were considered as conclusive. But on examination it will be found that none of these cases is in conflict with petitioner's position. The rule for which they all stand is that, when a foreign insurance company has once been doing business in a state and subsequently withdraws its agents and ceases to do new business there, it may nevertheless be sued there in all actions arising out of policies which were written in that state prior to its withdrawal and in respect to such actions the

company remains subject to service of process in accordance with the laws of that state. The petitioner does not presume or intend to question the soundness of such a rule.

Mutual Life Insurance Co. v. Spratley, 172 U. S. 602, and *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, on their facts go no further than the proposition as stated above. In the opinions, however, there is language used which does seem to announce a broader principle and it was doubtless this language which led the Minnesota Court to rely on these cases in the Wold case. This language must, however, be read in the light of its more recent interpretation by this Court which used it, and the reliance on these cases in the Wold case was doubtless due to the fact that the subsequent decisions of the United States Supreme Court, expressly limiting the Spratley and Davis cases, as authority, to the particular facts involved in them, were not called to the court's attention. If the Minnesota Court's attention had been invited to *Hunter v. Mutual Reserve Life Ins. Co.*, 218 U. S. 573, and *Provident Savings Ass'n. v. Kentucky*, 239 U. S. 103, the question would certainly not have been disposed of without so much as a mention of either of them.

Both the Spratley and Davis cases and also *Mutual Reserve Association v. Phelps*, 190 U. S. 147, and *Mutual Reserve Insurance Company v. Birch*, 200 U. S. 612, similar cases, were considered at length by this court in *Hunter v. Mutual Reserve Life Insurance Company*, 218 U. S. 573. The facts of the Hunter case were subsequently summarized by Mr. Justice Hughes in the Provident Savings Society case, as follows:

> "There the action was brought in New York against an insurance company upon judgments which had been obtained against the company in North Carolina. The

question turned upon the validity of the service of process in the North Carolina actions. The insurance company, a New York corporation, had been admitted to do business in North Carolina and had actually transacted business in that state prior to the year 1899. The legislature of North Carolina enacted a statute providing that any corporation desiring to do business in the state after June 1, 1899, must become a domestic corporation. Severe penalties were prescribed for violation. Thereupon, the Board of Directors of the company passed a resolution 'to withdraw from the state and to dispense with and terminate the services of all its agents.' The agents were withdrawn accordingly and the premiums on policies theretofore issued were subsequently 'remitted by mail to the Home Office of the company in New York, where the policies and premiums were payable.' There were in that case, outside of this course of business, four transactions within the state after the withdrawal, which were of minor importance and of isolated character. The actions in question, in the North Carolina Court, were not brought upon policies issued in North Carolina, and consequently it was sought to sustain the jurisdiction of the court upon the ground that despite the withdrawal of the company, it was still doing business within the state. The court expressly overruled this contention."

The broad language used in the Spratley case, on which the Minnesota Court doubtless relied in deciding the Wold case, and which is urged in support of the respondent's contentions in the present case, is set forth at length in the opinion in the Hunter case. For this reason and because Mr. Justice McKenna's analysis of the Spratley case cannot be improved upon, we quote it in full.

"In the Spratley case the life insurance policy, which was the subject of the suit, was issued by the insurance company when it was concededly present and doing business in the State of Tennessee. The service was upon an agent by the name of Chaffee, sent to investigate into the circumstances of the death of

Spratley and the claims of his widow. These facts distinguish the case from the one at bar. But certain language of the court is quoted to establish, not only was the insurance company so doing business in the state as to justify service of process upon the agent appointed by the company, but doing business generally. The court, through Mr. Justice Peckham, said:

> 'We think the evidence in this case shows that the company was doing business within the state at the time of this service of process. From 1870 until 1894, it had done an active business throughout the state by its agents therein, and had issued policies of insurance upon the lives of citizens of the state. How many policies it had so issued does not appear. Its action in July, 1894, in assuming to withdraw from the state was simply a recall of its agents doing business therein, the giving of a notice to the state insurance commissioner, and a refusal to take any new risks or to issue any new policies within the state. Its outstanding policies were not affected thereby, and it continued to collect the premiums upon them and to pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent.'

"And further:

> 'It cannot be said with truth, as we think, that an insurance company does no business within a state unless it has agents therein who are continuously seeking new risks, and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the state through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policyholders to an agent residing in another state, and who was once agent in the state where the policyholders resided. This action on the part of the company constitutes doing business within the state, so far as is necessary, within the meaning of the law upon this subject. And this business was continuing at the time of the service of process on Mr. Chaffee in Memphis.'

"This reference to the law in the state must be considered. A statute of the state provided that process might be served upon any agent of a corporation doing business in the state found within the county where the suit was brought, no matter what character of agent such person might be, and in the absence of such an agent it should be sufficient to serve process upon any person found in the county who represented the corporation at the time of the transaction out of which the suit arose took place. It was under this statute that service was made upon Chaffee. This service was held good, this court saying, in addition to what has been quoted above: 'Even though we might be unprepared to say that a service of process upon "any agent," found within the county, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether, upon the facts of this case, the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation.'

"Further explanation of the language of the court is contained in the following passage:

> 'A vast mass of business is now done throughout the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the state where the business was done, out of which the dispute arises.' "

The Phelps, Birch and Davis cases are also reviewed in the opinion in the Hunter case and, as is there stated, they are governed by the same principles as the Spratley case and any general language contained in them must be limited and qualified in the same manner as that in the Spratley case.

In *Provident Savings Ass'n. v. Kentucky* (*supra*), Mr. Justice Hughes sums up the result of the Hunter case as a limitation on the broad language used in the earlier cases.

"The defendant in error relies upon expressions contained in the opinions in *Connecticut Mutual Life Insurance Company v. Spratley*, 172 U. S. 602, 610, and *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, 157,—expressions which (in a full review of these cases and others) were explained and limited in *Hunter v. Mutual Reserve Life Insurance Company*, 218 U. S. 573. The case cited related to the validity of the service of process upon foreign corporations. And it was held that a foreign insurance corporation which had transacted business within the jurisdiction of a state continued, notwithstanding its withdrawal from the state, in actions arising out of the business so transacted, where the service was made in accordance with the conditions upon which the business was permitted to be done.

* * * * * * * * *

"It was recognized that the authority which the company had given with respect to service of process continued in force as to actions growing out of business which had been transacted within the state. But the continuance of the authority to accept service of process resulted from the nature and construction of that authority, and the view that the mere continuance of the obligation of contracts previously made within the state constituted a continuance of 'doing business' within the state so as to give the company a 'domicil of business' and thus subject it to the state's jurisdiction was distinctly disapproved."

It must be obvious that the Spratley and Davis cases cannot be relied on as authority for the proposition that the mere carrying of risks constitutes doing business. The rule of those cases can have no application until it is determined that the petitioner was doing business in Montana when Benn's policy was issued and that is precisely the question which is raised here.

The two earlier Minnesota cases relied on in the Wold case are *Kulberg v. Fraternal Aid Union*, 131 Minn. 131, 154 N. W. 748, and *Braunstein v. Same*, 133 Minn. 8, 157 N. W. 721. The defendant in these cases was a corporation

resulting from several consolidations and re-organizations. It had never had agents in Minnesota but at least one of its predecessors had concededly done business here, and had filed an appointment of the Insurance Commissioner as agent for the receipt of process in accordance with a statute which required it to consent to such an agency for all suits so long as its policies remained outstanding in this state. The policies sued on in both cases, had been issued by such predecessor in Minnesota prior to its exclusion in 1910. It was clear that the defendant succeeded to the liabilities of its predecessor. In the Kulberg case, Chief Justice Brown held that the facts brought the case within the rule of the Spratley scase, and this of course cannot be questioned. The language, however, used by the Minnesota Court in that case is broader than was necessary for the decision.

The Kulberg case is therefore exactly the same as the Spratley case—the facts are practically identical, and in each case the court stated a broader principle than was necessary to the decision. The United States Supreme Court took the first opportunity to correct this dictum of the Spratley case and when the Braunstein case arose the Minnesota Court did not base its decision on the broad language used in the Kulberg case but on the fact that the action was on a policy written in Minnesota when the defendant or its predecessor was doing business there and the case was therefore within the rule of the Spratley case as limited by the Hunter and Provident Savings Society cases.

These two previous Minnesota decisions do not conflict with petitioner's position any more than the Spratley and Davis cases do. As there is a federal question involved, the limitations placed on the language used in the Spratley

case must apply equally to the opinions in the Minnesota cases.

The Wisconsin case cited in the Wold case (*State v. Columbian National Life Ins. Co.*, 124 N. W. 502), was another case like the Spratley case, where the company had previously been doing business in Wisconsin, but while the court admitted that such a company might still be served by substitution in actions arising out of outstanding policies, it was held that they were not doing business so as to require them to comply with a statute regarding the filing of annual statements, etc. It is therefore identical in its facts and holding with the Provident Savings Society case.

(2) The right reserved by petitioner to investigate losses including the right to cause medical and post mortem examinations to be made was urged at the trial and will doubtless be urged here as constituting the doing of business in Montana.

We submit, however (a) that until such a right is exercised and agents are actually sent into Montana for these purposes the mere existence of the right cannot be held to be doing business, and the record is devoid of any evidence that this right has ever been exercised in Montana (b) that in any event investigation of claims by a foreign corporation is not such transaction of business as to subject the company to substituted service of process.

(a) The first proposition above must be self-evident. The right reserved is to investigate losses wherever they may occur. Petitioner's membership is made up of traveling men and the great majority of losses will naturally occur when the members are "on the road" and absent from their residences. If the reservation of the right to investigate is doing business wherever losses occur, peti-

tioner will be required to take out a license and pay the requisite taxes in every state in the Union to insure itself against involuntary violations of foreign corporation statutes and the consequent fines and penalties universally imposed therefor. The right to investigate is invariably reserved in every insurance contract. If this means that the company is doing business where the loss occurs, then, in effect, the location of the risk, be it property or person, becomes the test, although as has been already pointed out this test will not stand analysis and has been expressly repudiated by the United States Supreme Court.

It must be obvious that the mere making of a contract in Minnesota cannot under any conceivable theory constitute the doing of business in Montana, no matter what the terms of the contract are. Even if the contract were to be fully performed in Montana, there would be no doing of business in Montana until its performance was commenced and there was some act done in Montana. In this case, therefore, even if the actual investigation of losses in Montana could be regarded as the doing of business, which we do not concede, there is not any evidence that an investigation has ever been made of a loss in Montana and the evidence is clear to the effect that there was no investigatio. made of the particular loss involved in this case. This Court has held in accordance with the universal trend of authority that where a foreign insurance company sends its adjusters into a state with the power and authority to settle, compromise and adjust claims against it, it is doing business within that state.

Lumbermen's Insurance Company v. Meyer, 197 U. S. 407.

But it will be noted that the Court in the case cited

was very careful to expressly limit this holding to the exact facts of the case and by its statement of the rule it implies what must necessarily be true, i. e., that until the adjusters are actually sent into the state there is no doing of business therein by virtue of the mere right to send them there.

> "*When* under the terms of the contract the company sends its agent into the state where the property was insured and where the loss occurred for the purpose of adjustment it would seem plain that it was *then* doing the business contemplated by its contract within the state."
>
> 197 U. S. 414.

(b) *Not only is it clear on principle that the reservation of the right to investigate losses does not constitute doing business, but the authorities are unanimous in holding that the actual investigation of claims does not subject a corporation to the foreign corporation laws of the state where the investigation is made.*

We have already reviewed the undisputed testimony regarding the normal and usual method employed by petitioner in settling claims. Proofs of loss and the attending physician's reports are mailed to Minneapolis and are passed on there by the Board of Directors. In the ordinary case this is all that is required. It is occasionally impossible to get the required information from the attending physician. Blanks are then mailed to some local physician selected by the company from a list of reputable local doctors. The company could, of course, make any further investigation it deemed necessary. There is not even a suggestion anywhere in the record that this right has ever been exercised in any state, much less in Montana, and it is clear that no such investigation was made in regard to Benn's death. Even if an investigator were sent

out it would be a violation of the By-laws to clothe him with any authority beyond mere inquiry. The sole power to adjust, compromise or pay claims rests in the Board of Directors. Under these circumstances neither a local examining physician nor an investigator would be transacting business for the petitioner so as to authorize substituted service of process, even if it could be shown that any such examinations or investigations have ever been made in Montana.

In *Higham v. Iowa State Travelers' Assn.*, 183 Fed. 845 (C. C. W. D. Mo., W. D.), an action against a foreign corporation carrying on a business practically identical with that of the petitioner, except that no resident physicians are employed by the petitioner, the summons was served on one Dr. Watson whose relation to the company was described as follows by the court:

> "He was a resident physician of Kansas City, Mo., to whom the company from time to time wrote letters asking him to call on traveling men who had been injured, and who claimed indemnity against the company. It may, perhaps, be conceded that such reference was made to him in most matters occurring within this jurisdiction. On such occasions he visited the disabled person, examined him, and reported to the company whether he thought the man permanently or only temporarily disabled, and in some instances how long he thought the disability would continue. For this service he was paid a physician's fee in each case. He was not under salary, had no blanks to fill out, made no recommendations as to indemnity, adjusted no losses, had no power to contract or pay either losses or indemnities if allowed. His contractual relations with the company, such as they were, ceased with each individual case. The company was under no obligation to call upon him again. He never had any instructions from the company defining the duties of an agent. He did not act in the present case at all; never saw Robert Higham before

> or after death; and never heard from the company respecting this case until after he had been served with process, and that through its attorneys. It is quite evident, therefore, that he was not clothed with authority to adjust or pay this loss, or any loss, nor that he was ever appealed to for such purpose."

The defendant appeared specially contending that such service was not due process of law and this contention was upheld. The court says:

> "The only question then is whether the fact that he was from time to time employed by the company in isolated cases to report upon the physical condition of the injured policy holder makes him a person who aids or assists in doing any of the acts named in the statute so as to constitute him such an agent of the company that the state, exercising legislative power within the lawful bounds of due process of law, may designate him as one upon whom legal service may be made. My conclusion is that he does not stand in such a representative relationship to the company as to satisfy the requirements prescribed by the courts. I do not think such is the meaning of the statute in question, and, if that be the interpretation, then the Legislature has not kept within the lawful bounds of due process of law. To hold otherwise would be to uphold service upon those having the most casual connections by correspondence with foreign corporations. Such a ruling carried to its necessary logical conclusions discloses its own weakness. Mere knowledge or notice that might thus be brought home to the party sued would be insufficient without legal service."

Even if petitioner had occasionally caused investigations, other than medical examinations, to be made in Montana, the case would fall well within the rule regarding isolated transactions and substituted service could not be justified.

Buffalo Sandstone Company v. American Sandstone

Company, 141 Fed. 211 (C. C. W. D., N. Y.).

Hays v. General Association American Benevolent Association, 104 S. W. 1141, 127 Mo. A. 1141.

In the latter case the facts are stated by the court as follows:

> "But it is contended by plaintiff that D. C. Scott, on whom service was had as an agent of defendant corporation, was engaged in transacting business for the corporation in Montgomery county at the time the summons was delivered to him. The affidavit of Scott (conceded to be true) shows plaintiff had made a claim on defendant corporation for damages caused by the facts alleged in the petition, and that Scott, as agent of defendant company, went to Montgomery County to investigate the claim, and while there making such investigation the summons was delivered to him."

This service was held invalid.

If service cannot be made on the investigator or the doctor in such cases it must follow, *a fortiori*, that the acts done by them do not constitute "doing business."

In *Pembleton v. Illinois Commercial Men's Association*, 124 N. E. 355, 289 Ill. 99, it appeared that it was the recognized practice of the defendant to send out an officer or director to investigate claims and report back. It was held, however, that the defendant was not "engaged in business" in the state where the investigations were made.

It may be noted that we are here concerned with *investigation only* and do not pretend to criticize cases upholding service on *adjusters* with authority to compromise, settle and pay claims and accept releases on behalf of the company, although we submit that there is no case upholding service, even when made on an adjuster, except in an action on the particular claim being adjusted by the person served.

(3) It is urged by the respondent that because neither the certificate of membership nor the By-laws specifically provide that payments of losses shall be made at the Home Office in Minneapolis, losses are therefore payable at the residence of the member or his beneficiaries in accordance with the general rule that unless there is some indication of a different intention payments due under a contract are payable at the residence of the payee. We do not believe that this rule has any application to the facts of the present case. An examination of the By-laws of the Association will indicate that they contemplate no act on its behalf at any other place than the petitioner's Home Office in the State of Minnesota. There is in the Record the uncontradicted testimony of the cashier of the Association to the effect that no payments are or ever have been made at any other place; that all payments are made by check drawn on a Minneapolis bank and either handed to or mailed to the member or his beneficiaries; that no drafts on the Association are ever honored; in short, that in the entire history of the Association no act has ever been done by or on behalf of the Association in connection with the payment of any loss excepting at its Home Office in the State of Minnesota. There is therefore in this case every indication that payment of losses was not intended to be made at any other place than the petitioner's Home Office.

But, if it be assumed that losses are payable at the residence of the individual members, it is clear that no advantage has ever been taken of this fact and that no payment has ever been made in accordance with this construction of the contract. This being so, the mere fact that payments are due in other states could not constitute the doing of business in those states until and unless payments were actually made there. In this respect the obli-

gation of making payments would stand on the same footing as the right to make investigations. Until the one is fulfilled or the other exercised in a manner which involves some act within the State of Montana, they form no basis for arguing that the petitioner is doing business in Montana.

(4) *The action of members in inducing others to apply for membership in petitioner's Association is not the transaction of business by the petitioner* because (a) the members are in no sense agents of the Association, and (b) mere solicitation of applications, which is all the members do in any event, is not "doing business."

(a) The by-law providing that "every member of this Association shall use his influence in furthering the interests thereof" does not make every member an agent of the Association. The mere statement of this proposition would seem to be sufficient. However, considerable stress was laid on this by-law at the trial and we therefore quote from *Tomlinson v. Iowa State Traveling Men's Assn.*, 251 Fed. 171 (D. C. W. D., Mo.), where this specific question was discussed at length:

> "The By-laws contain the following altogether general provision:
>
> Every member of this Association shall use his influence in furthering the interest of the same.
>
> As is stated in the affidavit of the president, from time to time circular letters are written to the several members of the Association urging them, in the spirit of this by-law, to acquaint their brother traveling men with the virtues of said Association and the advantages of membership therein; but the defendant has no paid agents, servants, officers, nor representatives to secure members or solicit applications for membership. The services of the members in this regard, if rendered, are purely voluntary and without consideration, neither are their activities directed to-

ward any particular locality; nor do they contemplate the confines of any state. It will be noted that the defendant is a traveling men's association. Traveling men meet in all parts of the country. A member of the Association from Maine may meet a Missouri commercial traveler in the State of Washington, and there suggest to him the attraction of a certificate in this Iowa company. The fact that the same sort of transaction may have taken place in Missouri between citizens of Missouri, or between a citizen of Iowa and a citizen of Missouri, does not alter the case. The by-law itself, when passed, probably did not contemplate the circulars to which reference has been made, and certainly neither by-law nor circular has in view any particular locality in which the member shall use his influence in furthering the interest of the Association. These so-called agents of the defendant, who are relied upon as localizing its business in Missouri, represent the defendant in no such sense as would authorize and validate the service of summons upon them in such manner as to bind the company."

See to the same effect *Schwayder v. Illinois Commercial Men's Association*, 255 Fed. 797 (D. C. D. Colo.).

Members receive no compensation. The contention that the advertising matter offered from time to time as prizes or premiums for securing applications is compensation does not merit serious discussion. They have no authority to do any acts whatsoever on behalf of the company and are not subject to the control or direction of the company, nor are they answerable to the company for anything they may do. In short they are not agents of the company in any sense of the word.

(b) The fact remains, and we have no reason to dispute it, that members do induce others to apply for membership in the Association. As this action on their part is entirely voluntary and not in any way binding on the petitioner nor subject to the control or direction of peti-

tioner, it is difficult to conceive of a theory on which it could be held to be the transaction of business by petitioner. However, even if the members could be regarded as agents, the mere solicitation of applicants would not be "doing business." This is clearly established by controlling decisions of this Court which have been repeatedly followed and cannot now be questioned.

Green v. Chicago, Burlington & Quincy Ry., 205 U. S. 531, is the leading case on the subject. The rule is there stated:

> "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

International Harvester v. Kentucky, 234 U. S. 579, while it limits the doctrine of the Green case to facts which disclose *nothing more than mere solicitation*, does not in any way question the correctness of the rule. After quoting the above passage from the Green case, the court distinguishes the Harvester case:

> "In the case now under consideration there was *something more than mere solicitation*. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check or draft, and to take notes payable at banks in Kentucky."

The doctrine of the Green case has been invariably applied in cases involving mere solicitation, both by the Supreme Court and by the other Federal Courts.

People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79.

Atchinson, T. & S. A. Ry. Co. v. Weeks, 254 Fed. 513 (C. C. A., 6th Cir.).

Graustein v. Rutland R. Co., 256 Fed. 409 (D. C. Mass.).

The rule as established by the Green case is in no way peculiar to railroads but is of general application as shown by the Tobacco Co. case, *supra*. And it has been specifically applied to facts identical with those of the present case in *Pembleton v. Illinois Commercial Men's Ass'n.*, 124 N. E. 355, 289 Ill. 99.

After discussing the Green case and the limitation placed on it by the Harvester case, the Illinois Court concludes that

> "On the facts in that case (the Harvester case), and this, they are clearly distinguishable. It seems to be conceded that there was no authority here to pay for the insurance in money, check or draft, or take notes payable on banks in Nebraska. The only thing that the person soliciting insurance in this case could do was to forward the money, check or draft for premium with the application to the head office in Chicago for the approval of the appellant association."

The Illinois Court in the Pembleton case had an earlier decision of its own to contend with. *Firemen's Ins. Co. v. Thompson*, 40 N. E. 488, where it had held that an Illinois insurance company which took a risk in Wisconsin was subject to service of process in the latter state. It was conceded that the reasoning in the earlier case was contrary to the result reached in the Pembleton case, but the court dealt with the situation as follows:

> "The decision in this state as to due process of law under the Fourteenth Federal Amendment must be controlled by the decisions of the Federal Courts rather than by the decisions of our own or other state

courts. *Old Wayne Mutual Life Ass'n. v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345; *Thompson v. Whitman*, *supra; Forsyth v. Barnes*, *supra*. The decisions of the United States Supreme Court heretofore cited conclusively hold that the mere solicitation of business, as shown by this record, was not such doing business in Nebraska as to render the company liable to service of process therein. It is our duty, under the law, to overrule, if necessary, even our own decisions, and follow the rule laid down by the Federal Supreme Court in matters of this kind. *Rothschild & Co. v. Steger Piano Co.*, 256 Ill. 196, 99 N. E. 920, 42 L. R. A. (N. S.), 793 Ann. Cas. 1913 E 276."

(5) It may conceivably be urged that in spite of the fact that no single aspect of the course of business adopted by the petitioner constitutes, in and of itself, the doing of business in Montana, nevertheless the entire course of business of the petitioner taken as a whole does constitute the doing of business there. We have already demonstrated that none of the facts on which the respondent relies as constituting the doing of business in Montana does, in and of itself and without more, form any basis for holding that the petitioner was transacting business in Montana and there is ample authority to the effect that the course of business of the petitioner regarded as a whole is not doing business in any state other than the state in which it has its Home Office. In at least three very recent and thoroughly considered cases involving facts which cannot be distinguished from the facts of the present case insurance companies whose business was conducted in a manner identical with that of the petitioner were held not to be doing business in states other than that of their incorporation.

Tomlinson v. Iowa State Traveling Men's Ass'n., 251 Fed. 171 (D. C. W. D. Mo.).

Schwayder v. Illinois Commercial Men's Ass'n., 255 Fed. 797 (D. C. Colo.).

Pembleton v. Illinois Commercial Men's Ass'n., 124 N. E. 355, 289 Ill. 89.

The defendants in these cases were associations organized for the same purpose as appellant; they operated under By-Laws substantially similar to those of petitioner and their business was transacted in the manner described in detail above in the statement of facts. All the points raised by respondent in the present action were strenuously urged in these cases without success.

In the Tomlinson case, the defendant was an Iowa corporation and service on it was attempted in Missouri by serving the superintendent of the insurance department of Missouri under a statute practically the same as the Montana Statute. The case arose on a motion to quash this service, which motion was sustained. One of the points particularly urged on the court in this case was that the activity of members in inducing others to apply for membership constituted doing business. We have already commented on Judge Van Valkenburg's answer to this contention and invite this Court's attention to the sound reasoning which underlies the rest of his opinion, particularly to the manner in which he deals, in the closing paragraphs, with the suggestion that the result for which petitioner here contends will work hardship on the members or their beneficiaries.

> "I am of opinion that the defendant is not doing business in this state in any substantial sense. If it is, then in practically all cases where policies of insurance are issued by foreign companies to citizens of Missouri they can and must be held to be doing business here.
>
> * * * * * * * * *

The defendant is located at Des Moines, Iowa. Its By-laws provide that all applications for membership shall be presented to the Board of Directors, who meet only in Des Moines, and no person shall be considered as a member, nor shall the Association be liable in any manner, to any person as a member therein, until the said directors have accepted his application and a certificate of membership has been issued to him. The consummation of the contract is accomplished in the State of Iowa, and the affidavits of the president and of the secretary and treasurer of defendant positively and affirmatively state that such was the procedure in the instant case.

* * * * * * * * *

It is true that it is less convenient and probably more expensive, for the plaintiff to prosecute her action in Iowa, where valid service can readily be procured; nevertheless this is one of the incidents of doing business with a foreign insurance company of the character of this defendant, which does business almost, if not quite, exclusively with commercial travelers who live in widely separated localities. It may be doubted whether the burden imposed upon the entire membership of such an association, depending, as it does, entirely upon moderate assessments for the payment of losses, as a result of being compelled to defend presumably in every state of the Union, would not outweigh the physical and financial inconvenience of the individual beneficiary. However, this may be, the law must be administered as it is found to apply, and the plaintiff is not left without her remedy, but may pursue it, if valid and subsisting, in the proper jurisdiction."

The Schwayder case was an action begun in the State Court in Colorado against an Illinois association, and removed to the Federal Court, where the defendant appeared specially and moved to quash the service of summons which had been made on the Colorado Insurance Commissioner in accordance with the Colorado Statute and also the service made on one Mitchell, a member, and alleged to be an agent, of the defendant. The motion was granted.

The facts as to the defendant's course of business are stated by the court as follows, and accurately describe the course of business of this appellant:

> "The affidavits disclose that the defendant is a mutual insurance society organized under the laws of Illinois. It extends the privilege of becoming members of the society to a restricted class, viz., traveling men. It has no paid employes to go about the country soliciting members, or transacting any business for it. It depends solely upon the good-will and enthusiasm of those who are already members. It periodically sends to members circular letters calling their attention to the advantage of membership, and requesting that they recommend the society to other traveling men with a view to having them make application for membership. The universal procedure in acquiring membership is this: The applicant makes out his application in his own handwriting and mails it, with the first installment of dues, to the defendant at Chicago. The Board of Directors sit at Chicago to pass upon all applications. If an application be approved a certificate of membership is then issued to the applicant and mailed to him at his post office address indicated in his application. In the event of the death of a member proof of that fact is made out and sent to the defendant at Chicago. There is no agent or officer in Colorado, who can receive such proof or pass upon its sufficiency or who is authorized in any respect to deal with the beneficiary in adjusting the claim."

On these facts Judge Lewis found no difficulty in concluding, on the authority of recent decisions by the United States Supreme Court, that (1) defendant was not doing business in Colorado and (2) Mitchell was not in any real sense an agent of defendant. He states his opinion briefly as follows:

> "Under the State Statute the service had by leaving copies with the State Insurance Commissioner would have been good if the defendant was doing business in this state, and the service had on James

R. Mitchell would have been good if the defendant was doing business in this state and Mitchell was, at the time, its agent or representative to the extent required for that purpose. Mitchell was a member of the society, and the sole basis for the plaintiff's claim that the service on him was good, as is shown, is that it appears that he, on various occasions, solicited parties to send in their applications for membership; that he was requested to do so by circular letters received by him from the defendant, and that in this way he had authority to solicit members; that he was provided with blank forms of application, and those forms required that the applicant must be recommended by a member; that he, in September, 1917, solicited one Kobey, and that he forwarded Kobey's application when made out, and enclosed his personal check therewith for $2.10 in payment of Kobey's dues, and that said application was accepted and Kobey received as a member. On these facts I find that neither of the elements requisite to the validity of the service exists. They do not sustain but repel any conclusion that the defendant was 'doing business within the state in such a manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state the process will be valid only if served upon some authorized agent.' *Railway Co. v. McKibben*, 243 U. S. 265, 37 Sup. Ct. 280, 61 L. Ed. 710. Other cases in addition to those cited by counsel for defendant are *Tobacco Co. v. Tobacco Co.*, 246 U. S. 79, 38 Sup. Ct. 233, 52 L. Ed. 587, Ann. Cas. 1918 C. 537; *Simon v. Railway Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492; and *Toledo Co. v. Hill*, 244 U. S. 49, 37 Sup. Ct. 591, 61 L. Ed. 982."

The Pembleton case, decided by the Illinois Supreme Court in 1919, is the most recent case on all fours with the present case. Pembleton, a resident of Nebraska, secured a default judgment against the Illinois Association in an action commenced in Nebraska by service of process on one Weller, a member and alleged agent of defendant. The Circuit Court of Cook County enforced this Nebraska judgment and the defendant appealed. The Supreme

Court reversed the trial court. The point most exhaustively discussed by the Court is the solicitation of applicants by members. This opinion has already been referred to at length. The decisions of the United States Supreme Court bearing on this point were thoroughly reviewed and were considered sufficiently clear and conclusive to require the overruling of a former Illinois case.

In view of the cases cited, both from the decisions of this Court and other Federal Courts, and from the highest courts of other states than Minnesota, and in view of the principles which have been recognized by this Court as controlling in cases of this kind, we submit that the Record in this case does not justify the finding that the petitioner was doing business in Montana; the necessary result is that the Montana Court acquired no jurisdiction over the petitioner and its judgment is null and void and should not have been recognized by the Minnesota Courts.

II.

Irrespective of whether or not petitioner is or was doing business in Montana, the judgment herein sued on is void and unenforceable because the Montana Court rendering it had no jurisdiction over the cause of action. The action in Montana was on a contract of insurance evidenced by Benn's certificate of membership. The trial court did not find, and it can not be contended by respondent that this contract was a Montana contract. The testimony is undisputed that it was entered into in Minnesota and that it was in all respects a Minnesota contract. The Montana Courts cannot, under any circumstances, whether petitioner was or was not doing business there, acquire jurisdiction over an action arising out of a breach of such a contract by substituted service on a state

official to which petitioner has not actually consented. In other words, even if petitioner were doing business in Montana, no consent to such service could be implied as to an action on a contract which was entered into in Minnesota.

The leading and most authoritative case with reference to the requirements for jurisdiction over an action on an insurance policy issued by a foreign corporation is *Old Wayne Life Ass'n. v. McDonough*, 204 U. S. 8. It was there held that, whether or not a foreign insurance company is doing business within a state, substituted service, i. e., service on a state official, unless expressly consented to, cannot under any circumstances, give the courts of that state jurisdiction over transactions and causes of action arising outside the state. And this case has been followed as establishing the general rule applying, not only to insurance companies, but to all foreign corporations, and not only to causes of action based on contract but to those based on tort.

Simon v. Southern Ry., 236 U. S. 115.

The doctrine of the Old Wayne and Simon cases has never been questioned. It will be noted that this doctrine does not purport to cover cases where there was service on an actual agent of the foreign corporation and this includes an official of the state when he is appointed agent for service by a written instrument which can be construed to include actions arising in other states.

Until this Court passed upon the question in *Pennsylvania Fire Insurance Company v. Gold Issue Mining Company*, 243 U. S. 93, there was considerable diversity of opinion as to whether or not the doctrine of the Old Wayne and Simon cases did reach the case of service on an agent actually authorized to accept it. That case arose on a

writ of error to the Supreme Court of Missouri, the judgment below being affirmed. We invite the Court's attention to the exhaustive discussion of this question by the Missouri Supreme Court which was referred to with approval by this Court.

Gold Issue Mining Company v. Pennsylvania Fire Insurance Company, 267 Mo. 524, 184 S. W. 999.

In the brief opinion by Mr. Justice Holmes in the case last cited, the doctrine of the Old Wayne and Simon cases is specifically recognized but distinguished in the following passage:

> "The defendant relies upon *Old Wayne Mutual Life Association v. McDonough*, 204 U. S. 8, and *Simon v. Southern Railway Co.*, 236 U. S. 115. But the distinction between those cases and the one before us is shown at length in the judgment of the court below, quoting a brief and pointed statement in *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432. In the above mentioned suits the corporations had been doing business in certain states without authority. They had not appointed the agent as required by statute, and it was held that service upon the agent whom they should have appointed was ineffective in suits upon causes of action arising in other states. The case of service upon an agent voluntarily appointed was left untouched. 236 U. S. 129, 130. If the business out of which the action arose had been local it was admitted that the service would have been good, and it was said that the corporation would be presumed to have assented. Of course, as stated by Learned Hand, J., in 222 Fed. Rep. 148, 151, D. C. S. D., N. Y., this consent is a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defense. Presumably the fiction was adopted to reconcile the intimation with the general rules concerning jurisdiction. *Lafayette Insurance Co. v. French*, 18 How. 404. *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 353. But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put

upon it by act. *The Eliza Lines*, 199 U. S. 119, 130, 131."

The reluctance of this Court to hold a foreign insurance company which is not doing business within a state subject to suit on causes of action arising outside the state is so marked that unless there has been a decision of the State Court construing its own Statute or the statutory appointment of an agent for service which is filed pursuant to such Statute, this Court will not construe such an appointment so as to make it apply to causes of action arising in other states.

Robert Mitchell Furniture Company v. Selden Breck Construction Company, Adv. O., 66 L. Ed. 102.

In that case the court again recognized the doctrine of the Old Wayne and Simon cases when it said:

> "But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the state without appointing one. In the latter case the implication is limited to business transacted within the state. *Simon v. Southern R. Co.*, 236 U. S. 115, 131, 132, 59 L. Ed. 492, 500, 501, 35 Sup. Ct. Rep. 255; *Old Wayne Mut. Life Asso. v. McDonough*, 204 U. S. 22, 23, 51 L. Ed. 345, 351, 27 Sup. Ct. Rep. 236. Unless the state law, either expressly or by local construction, gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere, at least, if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence."

The facts of the present case bring it clearly within the doctrine of the Old Wayne case. The petitioner never has been licensed to do business in Montana and never has

filed an appointment of an agent for service as required by the Montana Statutes. The service was not on any actual agent of the petitioner but on the state officials of Montana. The contract was made in Minnesota. These facts are not denied and cannot be denied by the respondent. Applying the doctrine of the Old Wayne case, the petitioner under these circumstances cannot be, in an action arising out of a Minnesota contract, served with process by service on the state officials of Montana even if it is doing business in Montana contrary to the Montana Statutes.

In the Old Wayne case the original action was brought in Pennsylvania by a resident of that state on a policy of insurance executed in Indiana by an Indiana company. Service of summons was made on the Insurance Commissioner of Pennsylvania under a statute authorizing it. On the failure of defendant to appear, judgment was entered by default. An action was then brought in Indiana on the Pennsylvania judgment. The plaintiff prevailed in the State Courts but the defendant appealed to the United States Supreme Court and obtained a reversal. Mr. Justice Harlan, in delivering the opinion of the Court, after a consideration of the question of whether or not the defendant was doing business in Pennsylvania, discards this question as immaterial in the following language:

> "But even if it be assumed that the insurance company was engaged in some business in Pennsylvania at the time the contract in question was made, it can not be held that the company agreed that service of process upon the Insurance Commissioner of that commonwealth would alone be sufficient to bring it into court in respect to all business transacted by it, no matter where, with or for the benefit of citizens of Pennsylvania."

His closing remarks further indicate that the fact that the contract was made in Indiana was the controlling feature of the case:

> "Conceding then that by going into Pennsylvania without first complying with its Statute, the defendant association may be held to have assented to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. Indeed, the Pennsylvania Statute, upon its face, is only directed against insurance companies, who do business in that commonwealth—'in this state.' While the highest considerations of public policy demand that an insurance corporation, entering a state in defiance of a statute which lawfully prescribes the terms upon which it may exert its power there, should be held to have assented to terms as to such business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another state, although citizens of the former state may be interested in such business.
>
> As the suit in the Pennsylvania Court was upon a contract executed in Indiana; as the personal judgment in that court against the Indiana corporation was only upon notice to the Insurance Commissioner, without any legal notice to the defendant association and without its having appeared in person, or by attorney or by agent in the suit; and as the act of the Pennsylvania Court in rendering the judgment must be deemed that of the state within the meaning of the Fourteenth Amendment, we hold that the judgment in Pennsylvania was not entitled to the faith and credit which by the Constitution is required to be given to the public acts, records and judicial proceedings of the several states, and was void as wanting in due process of law."

In the Simon case, the facts of which are not pertinent

to the present issues, the doctrine of the Old Wayne case is well stated by Mr. Justice Lamar, and the inconveniences resulting from any other rule are pointed out. The action there was based on a tort but the court makes no distinction on this ground.

> "Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein; to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Assn. v. Phelps*, 190 U. S. 147; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 603. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts wherever made and suits for torts wherever committed might by virtue of such compulsory statute be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extra-territorial extension of jurisdiction, by virtue of the power to make such compulsory appointments, could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Life Association v. McDonough*, 204 U. S. 22, that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states."

It is impossible to distinguish the case at bar from the Old Wayne case in any material respect. The record is clear to the effect that the contract was made in Minnesota, the summons was served only on state officials, and under these circumstances the Old Wayne case con-

clusively establishes that there was no jurisdiction in the Montana Courts, and the enforcement of a judgment rendered without jurisdiction would be a violation of the Fourteenth Amendment to the Federal Constitution.

The rule of the Old Wayne case has been expressly applied to facts identical with those presented on this appeal.

Tomlinson v. Iowa Traveling Men's Assn., 251 Fed. 171, 173 (D. C. W. D. Mo.).

The rule of the Old Wayne case is so clearly stated in the cases already cited and is so obviously applicable to the facts of the present case as to be decisive irrespective of the Court's decision of other questions presented.

III.

In their brief submitted to the Minnesota Supreme Court, counsel for the respondent contended that the petitioner, by appearing specially in the District Court of Montana, and objecting to the jurisdiction of that Court, thereby gave that Court jurisdiction to determine its own jurisdiction, and is now estopped from disputing the correctness of that Court's determination. We assume that the same contention will be made here.

Any such claim is at variance with the accepted purpose and the generally understood effect of an objection to the jurisdiction of a Court such as was made in this case.

The petitioner in appearing specially before the Montana Court and objecting to its jurisdiction, asked no relief, the granting of which required the Montana Court to assume jurisdiction over it. This is universally recognized as the test of whether or not an appearance before a Court confers on that Court jurisdiction.

In the case at bar the objection was made broadly to the assumption by the Montana Court of any jurisdiction over the petitioner, because it was without the state, had not been served with any process within the state, and had not consented to the jurisdiction of the Montana Courts. It cannot, therefore, be held that the Montana Court, by overruling this objection to its own jurisdiction, committed the petitioner to its jurisdiction. That would be to hold that the petitioner assented to the very thing which it expressly dissented from in making the objection.

The determination by the Montana Court that it had jurisdiction was necessarily involved in the rendering of a judgment against the petitioner, irrespective of whether or not any objection was raised to its assumption of jurisdiction. Whether the petitioner appeared specially and objected to the Court's jurisdiction or took no action whatever, the entry of the judgment would have the same effect. By its judgment the Montana Court necessarily determined that it had jurisdiction of the petitioner and of the cause of action, and yet a judgment is always open to collateral attack on the ground that the Court rendering it had no jurisdiction, irrespective of any recital to the contrary in the judgment itself or any finding by the Court entering the judgment that it had jurisdiction.

Thompson v. Whitman, 18 Wall. 457.

Noble v. Union Logging Railroad, 147 U. S. 165.

Grover & Baker Machine Co. v. Radcliffe, 137 U. S. 287.

The position of the respondent in this regard has some apparent force only because a State Court assuming jurisdiction over a person admittedly within the state may determine the existence or non-existence of facts which make the exercise of jurisdiction proper and legal. Deci-

sions may of course be found so holding, and, because of the different senses in which the word "jurisdiction" is used, some of the language in such cases will lead to confusing them with cases such as the one at bar, unless it is read in the light of the facts involved. Such a principle can have no application to such a case as this where the Courts of Montana had not acquired and could not acquire jurisdiction over the petitioner through service of process on a Montana state official.

A distinction may be drawn from the few cases which discuss this question between jurisdiction depending on facts of a local or intrastate nature and jurisdiction depending on facts of a foreign or interstate nature. Where a defendant is within a state and is served personally (or, in the case of a corporation, by service of an actual agent) within the state, the state as a sovereignty necessarily has jurisdiction in the broad sense of the word, viz., the power to deal with the defendant, but a question may nevertheless arise as to whether, by reason of the fact that process was not served in the manner prescribed by the local statute or by reason of the fact that there was fraud in procuring the service of process, the state will exercise the power or jurisdiction which it admittedly has. In such a case a defendant appearing and raising an issue as to these facts may well be held bound by the determination of the trial court, subject only to the right of appeal. But when the Courts of one state seek to exercise an extraterritorial jurisdiction over a citizen of another state, who is not actually within its borders, an objection to the exercise of such jurisdiction cannot confer it either under the full faith and credit clause of the Federal Constitution, or on any other principle applicable to Federal or interstate questions.

All the cases supporting the doctrine of estoppel by special appearance involve simply questions of jurisdiction in the local sense, i. e., in none of them was there any attempt to obtain jurisdiction over persons or property not within the territorial boundaries of the state. In all of them actual personal service was had within the state upon the defendant, or if the defendant was a corporation upon an actual agent or officer of the defendant, which is the same as personal service on an individual.

In the leading case of *Sipe v. Copwell*, 59 Fed. 971, the action was on a foreign judgment rendered in Rhode Island. Personal service was had upon the defendants while in Rhode Island and there was, therefore, no question but that the defendants were subject to the control of the state of Rhode Island. The defense was that the Court did not obtain jurisdiction because the defendants were in attendance upon the Supreme Court of Rhode Island as parties in another action when the service was made. These facts raised a question as to the jurisdiction of the Court in the local sense as distinct from the jurisdiction of the state of Rhode Island in the international sense. The following passages from Judge Lurton's opinion sustain our interpretation of the case and indicate that it has no application to the present case (Italics ours):

> "Is the judgment of the Rhode Island Court void? We think it is not. That Court had jurisdiction of the subject matter; this is not contested. *It had jurisdiction of the defendants by personal service* of the writ of summons."
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> * * * * * * * * *
>
> "*It is not a question as to the effect of constructive or substituted service* as in *Pennoyer v. Neff*, 95 U. S. 714. *There was actual service of process.* Whether there was an abuse of the process of the Court was a question for the determination of the Court whose

> process is complained of. * * * Having jurisdiction of the subject matter and of the person by actual service of process, it had the power to determine for itself that its process had not been abused nor the jurisdiction acquired fraudulently."

In *Tootle v. McClellan*, 103 S. W. 766 (Ind. Terr.), the original action was brought in Missouri and personal service was made on the defendant while in that state. Defendant appeared specially and moved to quash the service on the ground that he had been enticed into the state to take depositions. This motion was denied and judgment was entered by default. In an action on this judgment in Indian Territory it was held that defendant could not again contest the jurisdiction of the Missouri Court on this ground. Here again no question of jurisdiction in the international sense was involved.

The opinion in the last cited case contains a thorough discussion of the principle of estoppel by special appearance and also a complete review of the authorities, and makes it apparent that this principle has no application to a case like the present where there has been no actual personal service within the state. The Court says in part:

> "After a careful examination of the authorities, we have been able to find but one case holding a different doctrine; but it will be seen by an examination of it (*Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447) that while the Court say the fact that one Court finds it has jurisdiction does not give it jurisdiction, and that it may be shown in a collateral proceeding in another state that it in fact did not have jurisdiction, still in that case the Texas Court took jurisdiction by reason of service out of the state on a non-resident and thus undertook to give to its laws extra territorial effect, and the Supreme Court of New York held that the finding of the Texas Court that it had jurisdiction was not binding on the defendant, even though he had appeared specially and moved

to quash. It will be observed, however, that the Texas Court did not find the existence of facts which, if true, would give it jurisdiction, but it found that it had jurisdiction upon a state of facts which did not, in fact, give it jurisdiction. There is a fundamental and important distinction between the two. We approve of the opinion of the Supreme Court of New York in the case of *Jones v. Jones, supra*, upon the facts appearing in that case, although the language of the Court, that 'the fact that a Court finds it has jurisdiction does not give it jurisdiction,' applied generally is too broad. And in this case, if jurisdiction had been obtained, or attempted, by the Missouri Court by personal service without the limits of the state, or by publication of a warning order, as in *Pennoyer v. Neff, supra*, and the Missouri Court had held, upon such facts, that it had jurisdiction, we would have no hesitancy in holding that, in thus attempting to give its laws extra-territorial effect, it acted without authority of law, and its exercise of jurisdiction would be void. But this case presents no such aspect."

Applying the rule as stated in the passage quoted to the facts of the case at bar, we find that the Montana Court has found that, on the facts stated in the affidavit filed in support of the motion to quash the service, they had jurisdiction of the petitioner. The facts stated in the affidavit are the same as those brought out on the trial in Minnesota. The respondent is demanding that the petitioner be held bound by the ruling of the Montana Court that on these facts it had jurisdiction. This is exactly the situation which the Supreme Court of Indian Territory distinguished in the case cited and the exact situation to which the doctrine of estoppel by special appearance does not apply, i. e., where the Court in which the special appearance is made finds that it has jurisdiction on a state of facts which under the Federal Constitution cannot give it jurisdiction.

In *Jones v. Jones*, 15 N. E. 707 (N. Y.), which is cited and distinguished in the passage last quoted, the original action for divorce was commenced in Texas and service was made on the defendant in New York. The defendant appeared specially to attack the jurisdiction of the Texas Court but his motion to quash the service was overruled. The defendant subsequently sued for divorce in New York and was met with a plea setting up the Texas judgment. The New York Court held that the defendant was bound by the Texas judgment, but solely upon the ground that he had proceeded to trial on the merits which, under a Texas Statute, waived the question of jurisdiction. The Court specifically stated, however, that had it been simply a case of special appearance and nothing more, the objection to the jurisdiction of the Texas Court would still have been open to the defendant.

Neither the doctrine of estoppel by special appearance nor the limitation thereof to cases involving questions of jurisdiction in a strictly local sense, has ever been specifically stated by the United States Supreme Court. But that this doctrine, if valid at all, must be so limited is apparent from the general language of this Court in all the cases which discuss the question of jurisdiction in the broad or international sense.

In *Thompson v. Whitman*, 18 Wall. 457, 468, it was said:

> "But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the Court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can effect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force."

The distinction between the two types of jurisdictional questions was well brought out in *Noble v. Union River Logging Railroad*, 147 U. S. 165, where it is said:

> "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the Court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common law action. * * *
>
> "There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the Court, cannot be attacked collaterally. With respect to these facts, the finding of the Court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties."

In *Grover & Baker Machine Company v. Radcliffe*, 137 U. S. 287, a case where it was sought to enforce in Maryland a judgment entered by confession in Pennsylvania, this Court said, at page 298:

> "A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, *this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the state entering judgment;* and it is competent for a defendant in an action on a judgment of a sister state, as in an action on a foreign judgment, to set up as a defense, want of jurisdiction, in that he was not an inhabitant of the state rendering the judgment and had not been served with process, and did not enter his appearance. *Whart. Conflict Laws*, Sections 32, 654, 660; *Story, Conflict Laws*, Sections 539, 540, 586."

Cases cited and relied upon by respondent, to which we have here referred in order that a reply brief may be avoided, do not reach the facts of the present case but expressly

except such a case from the operation of the doctrine of estoppel which is urged, and the fundamental conception of its being impossible for a state to give to its laws an extra-territorial effect is inconsistent with the application of the doctrine to this case.

Nor does the procedure which respondent's counsel argued in the State Court should have been followed by the petitioner appeal to us or accord with what we believe to be the universally recognized proper practice.

When sued in Montana the petitioner might either, by appearing specially, notify the Court of the fact that it did not have jurisdiction, and object to its arbitrarily taking jurisdiction, or do nothing and allow a default judgment to be entered against it. If the respondent's position is correct, the petitioner is necessarily relegated to the second alternative of permitting the entry of a default judgment against it in Montana. There are many reasons why this course would not afford the protection to the petitioner to which it is entitled. Suffice it to say that irrespective of the validity of such a judgment, the mere existence of it would result in irreparable injury to the reputation of the petitioner, on which its very life depends.

There is no apparent reason from a practical or legal point of view why a Minnesota corporation should not be permitted to present to any Court where an action against it is started an objection to that Court's assumption of jurisdiction which it does not in fact possess, and thereby attempt to induce the Court to restrict its action to matters within its jurisdiction, without running the risk of barring itself thereafter from showing that the Court in fact exceeded its jurisdiction. Whether or not the Montana Court had jurisdiction to enter the judgment in suit

is a question arising under the Constitution of the United States. The Montana Court may have ruled on this question, as indeed it must in every case of its own motion, even though the point is not raised by the parties, but it cannot by any act of its own validate its judgment against a party over whom it is prohibited by the Federal Constitution from exercising any jurisdiction.

It is significant that it appears from the report of *Mutual Reserve Association v. Phelps*, 190 U. S. 147, that there had been a special appearance in the state where that action was originally brought, and yet this Court makes no mention of the doctrine of estoppel, although it is apparent from the opinion that it was considerably troubled by the other questions involved and should have been more than willing to adopt so easy a method of disposing of the case if in fact this doctrine of estoppel is sound as applied to the facts here involved.

In the absence of any direct discussion of this point in the decisions of this Court and the infrequent discussions of it by other Courts, we confidently submit to this Court —having in mind the general understanding of members of the Bar as to the purpose and effect of an objection to the jurisdiction of a Court by special appearance and the general practice based thereon—that the objection made by the petitioner in this case to the jurisdiction of the Montana Court did not bring the petitioner within that jurisdiction and did not give the Montana Court extra-territorial jurisdiction.

IV.

The Trial Court was in error in allowing plaintiff eight per cent interest on the amount of the Montana judgment, even if we assume that the other rulings of the Trial

Court can be sustained.

By Statute in Montana judgments carry interest at eight per cent, but in an action on a foreign judgment the law of the forum governs the rate of interest which may be recovered and not the law of the state where the judgment was rendered.

Section 5805, General Statutes Minnesota, 1913, establishes six per cent as the rate of interest on "any legal indebtedness" unless otherwise "contracted in writing." A judgment is legal indebtedness, but it is not a contract. The Minnesota Court has said in *Olsen v. Dahl*, 99 Minn. 433, at 436:

> "It is not at all difficult to demonstrate theoretically at least, that a judgment is a contract. Blackstone makes the statement in his commentaries that it is, and some of the authorities, following in line with his theory, have classed it with specialties. 3 *Blackstone Comm.* 160; *Sawyer v. Vilas*, 19 Vt. 43. But a practical consideration of the question, in the light of the essentials to the existence of valid contract relations, leads to the contrary conclusion. In fact, the weight of authority, both in England and this country, is to the effect that a judgment is not a contract in any proper sense of the term."

Similar reasoning has been adopted by this Court in holding that a statute changing the rate of interest recoverable on judgments may apply to those already existing without impairing the obligation of contracts.

Morley v. Lake Shore Ry. Co., 146 U. S. 162.

It is generally recognized that the law of the forum determines the rate of interest which can be recovered on a foreign judgment.

Clark v. Child, 136 Mass. 344.

Wells Fargo & Co. v. Davis, 12 N. E. 42 (N. Y.).

In the Wells Fargo case the foreign judgment expressly provided for interest at the rate of ten per cent according to the laws of Utah where the judgment was rendered. It was held error to allow recovery of interest in excess of the New York rate, the reason being that interest on a judgment is recoverable not by virtue of an implied contract, but as damages for delay in performing the obligation created by the judgment.

In *Clark v. Child*, *supra*, the judgment sued on had been entered in California and by its express terms carried interest at seven per cent, whereas the Massachusetts rate was six per cent. This is a leading case on the subject and the Court's clear and concise statement of the principles involved was as follows:

> "The remaining question is as to the rate of interest which the plaintiff is entitled to recover. In suits upon judgments, interest is recoverable, not as a sum due by contract of the parties, but as damages, and follows the rule in force in the jurisdiction where the suit is brought. It has therefore been held, that, in such suits upon judgments of sister states, the plaintiff recovers interest according to our laws, and not according to the laws of the state in which the judgment is rendered. *Barringer v. King*, 5 Gray, 9; *Hopkins v. Shepard*, 129 Mass. 600. If, by the general laws of California it was provided that, upon all judgments of its Courts, interest should run at the rate of seven per cent, this provision would not operate in another state in a suit upon a judgment. The fact that the provision is embodied in the record of the judgment cannot give it greater force. It is not an essential part of the judgment which other states are bound to respect and enforce, but affects the remedy upon it, which is governed by the *lex fori*. One state cannot thus control the remedy and determine the rule of damages which shall govern sister states in which a remedy is sought upon such judgment."

This Court has expressly recognized the rule of the New

York and Massachusetts cases as established law.

Morley v. Lake Shore Ry. Co., supra.

The basis of the correct rule as stated above is that interest is recoverable as damages for the delay in paying the judgment, and the Minnesota Court has repeatedly stated and decided that this is the true nature of the right to interest in the absence of express contract.

Ormond v. Sage, 69 Minn. 523.

Schrepfer v. Rockford Ins. Co., 77 Minn. 291.

It necessarily follows from this rule as to the real nature of interest recoverable on judgments, which is recognized in Minnesota and elsewhere, that the rate of such interest is purely a matter of remedy and as such is to be determined according to the law of the forum where action is brought on the judgment.

Respectfully submitted,

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